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Case No. 03-1127

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Ring v. Arizona, 536 U.S. 584, rendered Florida's capital sentencing scheme unconstitutional?

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IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

OPINION BELOW

The order below has been referenced as Van Poyck v. Crosby, Case No. 02-2661.

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1257. Although this is the appropriate provision, the requirements of same have not been met.

STATEMENT OF THE CASE AND FACTS

The facts underlying Van Poyck's murder conviction and subsequent death sentence are as follows:

> The record establishes that on June 24, 1987, corrections officers Steven Turner and Fred Griffis transported James O'Brien, a state prison inmate, in a van from Glades Correctional Institute to a dermatologist's office for an examination. Griffis, who was not armed, drove the van while Turner watched O'Brien, who was secured in a caged area behind Griffis. After Griffis pulled the van into an alley behind the doctor's office, Turner looked down for his paperwork. Upon looking up, he saw a person, whom he later identified as Van Poyck, aiming a pistol at his head. Van Poyck ordered Turner to exit the van. At the same time, Frank Valdez, an accomplice of Van Poyck's, went to the driver's side of the van. Turner testified that Van Poyck took his gun, ordered him to get under the van, and kicked him while he was attempting to comply with Van Poyck's order. He testified that, while under the van, he saw Griffis exit the van; he noticed another person forcing Griffis to the back of the van; and, while noticing two sets of feet in close proximity to the rear of the van, he heard a series of shots and saw Griffis fall to the ground. Turner further stated that Van Poyck had stopped kicking him when the gunfire started, but noted that he did not know where Van Poyck was at the time of the shooting. Griffis was shot three times, once in the head and twice in the chest. Expert testimony indicated that the shot to the head was fired with the barrel of the gun placed against Griffis' head and that each of the wounds would have been fatal. It was also determined that the murder weapon was

a Hungarian Interarms nine millimeter semiautomatic pistol.

After Griffis was shot, Turner was forced to get up from under the van and look for the keys. Upon realizing that Turner did not have them, Valdez fired numerous shots at a padlock on the van in an attempt to free O'Brien. One of the shots ricocheted off of the van and struck Turner, causing him minor injuries. Turner testified that at around this time Van Poyck aimed the Hungarian Interarms semiautomatic nine millimeter pistol at him and pulled the trigger. Although no bullet was fired, Turner stated that he heard the gun click. Turner then fled the scene when Van Poyck turned his attention to Valdez, who was smashing one of the windows on the van. After Van Poyck noticed that two cars had just driven into the alley, he and Valdez approached the cars and Van Poyck shattered the windshield of one of the cars with the butt of a gun. Van Poyck and Valdez then ran to a Cadillac parked in an adjacent parking lot and departed from the scene. A police officer, who arrived at the scene and witnessed the two men leaving, radioed for help and a chase followed. During the chase, Van Poyck leaned out of the car window and fired numerous shots at the police cars in pursuit, hitting three of them.

Valdez eventually lost control of the Cadillac and the car crashed into a tree. Van Poyck and Valdez were immediately taken into custody and four pistols were recovered from the car: a Hungarian Interarms nine millimeter semiautomatic pistol, a Sig Sauer nine millimeter semiautomatic pistol, a Starr .22 caliber semiautomatic pistol, and Turner's Smith and Wesson .38 caliber service revolver.

> Van Poyck, testifying in his own behalf, denied that he shot Griffis and stated that, while kicking Turner, he heard the gunshots and saw Griffis fall to the ground. He did, however, acknowledge that he planned the operation and recruited Valdez to assist him in his plan. Additionally, he stated that they took three guns with them.

Van Poyck v. State, 564 So. 2d 1066, 1067-1068 (Fla. 1990), *cert. denied,* 499 U.S. 932 (1991).

On appeal, Van Poyck raised four challenges related to his status as the non-triggerman. They were as follows: (1) there was insufficient evidence to support a finding of premeditation; (2) the trial court's sentencing order did not properly set out the factual findings in support of the of the death sentence as required in Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987); (3) death was disproportionate based on Van Poyck's non-triggerman status; (4) the trial judge failed to properly instruct the jury regarding what requisite circumstances must be present to impose death upon a non-triggerman. Van Poyck, 564 So. 2d at 1070.

Although the Florida Supreme Court found insufficient evidence of premeditation, death was still the appropriate sentence based on the following findings:

> We find no merit in Van Poyck's claims that he was a minor actor and did not have the culpable mental state to kill. In DuBoise v. State, 520 So. 2d 260 (Fla. 1988), we reiterated the established principle in Florida that the death penalty is appropriate even when the defendant is not the triggerman n* and discussed proportionate punishment, stating:
>
> > In Tison the Court stated that Enmund covered two types of

cases that occur at opposite ends of the felony-murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted [**12] to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony-murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that major

> participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement."
>
> Id. at 265-66 (citations omitted, emphasis added) (quoting Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987)). Although the record does not [**13] establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony [*1071] murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Van Poyck, 564 So. 2d at 1070-1071.

Van Poyck filed a motion for postconviction relief in December of 1992. Following an evidentiary hearing, all relief was denied. Therein Van Poyck again presented issues related to his status as the non-triggerman. Those issues were as follows; (1) trial counsel was ineffective for failing to present evidence that Van Poyck was not the shooter; (2) trial counsel was ineffective for allowing the state without objection to shift the burden to Van Poyck to prove that he was not the shooter; (3) the state withheld evidence regarding the true identity of the triggerman; (4) the jury impermissibly relied on the erroneous information that Van Poyck was the shooter; (5) the trial court instructed the jury on an erroneous version of the Enmund/Tison standard, and the trial court itself applied that same incorrect standard. All relief was denied. Van Poyck v. State, 694 So. 2d 686, 689, 698 (Fla. 1997), *cert. denied*, 522 U.S. 995 (1997).

In his state habeas petition, Van Poyck argued that his death sentence was unconstitutional because the judge and jury wrongly considered as a factor that he was the shooter. Van Poyck v. Singletary, 715 So. 2d 930, 931 (Fla. 1998), *cert. denied*, 526 U.S. 1018 (1999). All relief was denied.

In February of 1999, Van Poyck filed a federal habeas petition. The district court denied all relief. Van Poyck presented the following issues regarding his status as the non-triggerman on appeal: (1) trial counsel was ineffective for not presenting evidence that Van Poyck was not the triggerman; (2) the judge and the jury improperly considered that Van Poyck was the shooter; (3) the state withheld evidence establishing that Van Poyck was not the shooter. Again all relief was denied. Van Poyck v. Moore, 290 F.3d 1318 (11th Cir. 2002), *cert. denied*, 537 U.S. 812 (2002).

Van Poyck filed a successive habeas petition in the Florida Supreme Court in December of 2002. Therein he alleged that Ring v. Arizona, has implicitly overruled Cabana v. Bullock, and Hildwin v. Florida. Because the jury in the instant case was never required to put in writing their findings regarding Van Poyck's culpability pursuant to Enmund v. Florida, and Tison v. Arizona. and because the Florida Supreme Court made additional findings regarding Enmund/Tison, Van Poyck's sentence is a violation of the Sixth Amendment. The Florida Supreme Court entered its order denying the petition on August 20, 2003. (B-1). A motion for rehearing was denied on October 31, 2003. (A-1). Petitioner is now seeking certiorari review in this Court.

REASONS FOR DENYING THE WRIT

THE CLAIMS ARE PROCEDURALLY BARRED, RING DOES NOT APPLY RETROACTIVELY AND RING DOES NOT APPLY TO FLORIDA'S CAPITAL SENTENCING LAW.

Van Poyck claims that review is warranted because the Florida Supreme Court's appellate findings regarding Enmund v. Florida, 458 U.S. 782 (1982), and Tison v. Arizona, 481 U.S. 137 (1987), are now constitutionally suspect in light of Ring v. Arizona, 536 U.S.84 (2002). Van Poyck alleges that Ring has implicitly overruled both Hildwin v. Florida, 490 U.S. 638 (1989), and Cabana v. Bullock, 474 U.S. 376 (1986). He asserts that Enmund/Tison findings must be made in writing by a jury. Van Poyck raised this claim in a successive state habeas petition to the Florida Supreme Court. Following the state's response the Court summarily denied the petition finding it procedurally barred. (B-1). Certiorari review is not warranted for a number of reasons.

First, Van Poyck cannot establish the requisite jurisdiction because the "decision" of the state's highest court was not based on any application of federal law. Rather, Van Poyck's claim was summarily denied because it was procedurally barred under state law. See Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994)(ruling that issue raised in successive petition is procedurally barred if basis for claim was available at time of first petition); Card v. Dugger, 512 So. 2d 829, 830-831 (Fla. 1997)(same). Although Van Poyck has raised a number of variations regarding his Enmund/Tison claim, he has never argued that the Sixth Amendment requires a jury finding pursuant to Enmund/Tison or that such a finding be in writing.[1] That state procedural default is

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[1] The wherewithal to advance this claim was available to Van Poyck at the time of his trial. See Chandler v. State, 423 So. 2d 171, 173 n. 1 (Fla. 1983). Van Poyck never raised such a claim until the successive habeas petition.

an adequate and independent state ground, which precludes further review. Sochor v. Florida, 504 U.S. 527, 534 (1992)(holding this Court was without authority to address a claim that the Florida Supreme Court had found to be not preserved for appeal). In Coleman v. Thompson, 501 U.S. 722, 729 (1991), this Court reaffirmed that "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." In essence the state procedural bar attached to this claim would render any opinion from this Court as a nullity. See Lambrix v. Singletary, 520 U.S. 518, 523 (1997)(finding lack of jurisdiction to review independently supported judgments on direct appeal and observing that because the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory). Thus, this Court lacks authority to review a question of federal law because the state court's decision rested on state law ground that is independent of the federal question and adequate to support the judgment.

Even if the claim was not procedurally barred under state law, there would still be no reason to grant review in this matter. Petitioner would be entitled to no relief because Ring does not apply retroactively. Van Poyck's conviction became final in May of 1991, when this Court denied certiorari. Ring was not issued until June 24, 2002. As such, in order for Petitioner to benefit from Ring, it either had to be a change in substantive law[2] or meet one of the two exceptions under Teague v. Lane, 489 U.S. 288 (1989). However, Ring is procedural and meets neither exception.

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court expressly stated that the new rule announce in that case was procedural. Id. at 475 ("The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's procedure is.") In Ring, this Court determined that Apprendi

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[2] Bousley v. United States, 523 U.S. 614, 620 (1998).

applied to Arizona's capital sentencing scheme. Id. at 596-97. As Apprendi is a procedural rule, its application to Arizona's capital sentencing scheme in Ring is also a procedural rule. Moreover, Ring did not alter what had to be found or by what burden of proof; it merely changed the fact finder. In United States v. Gaudin, 515 U.S. 506, 521 (1995), this Court determined that a jury, rather than a judge, had to find the materiality element of perjury. Yet, this Court stated that such a change of "fact finders" was a procedural change. Id. As such, Ring is procedural, and Teague applies.

Moreover, Ring does not satisfy either of the Teague exceptions. The first Teague exception applies to cases that decriminalize certain conduct or prohibit a form of punishment on a class of defendants. Ring did neither of these things. Ring merely shifted the fact finding role in Arizona's capital sentencing scheme from the judge to the jury. As such, the first Teague exception does not apply.

The second Teague exception applies to watershed rule of criminal procedure that "are implicit in the concept of ordered liberty." Id. at 307. In order for this exception to apply, the failure to use the new rule must "create[] an impressibly large risk that the innocent will be convicted," and the new rule must "implicate the fundamental fairness of the trial." Id. at 312. Again, Ring does not meet this exception. In Ring, this Court noted that it was not requiring a jury finding of an aggravator because it perceived that such a procedure was more reliable or fairer. Id. at 607. In fact, in Proffitt v. Florida, 428 U.S. 242, 252 & n.10 (1976), this Court noted that a judge's involvement in sentencing would lead to fairer sentencing. As such, Ring fails the second exception to Teague.

This Court has refused to apply Duncan v. Louisiana, 391 U.S. 145 (1968), which applied the Sixth Amendment right to a jury trial to the states, retroactively. DeStefano v. Woods, 392 U.S. 631, 633 (1968). It is illogical that application of the Sixth Amendment right to jury trial as a whole would not be retroactive but a change in fact finder regarding one element would be. As

such, Ring is not retroactive, Petitioner is not entitled to its alleged benefit and resolving Petitioner's alleged conflict would not affect the judgment in his case. Certiorari should be denied.

Moreover, a number of Courts of Appeal and state appellate courts that have addressed the retroactivity of Ring have held that it does not apply retroactively. Turner v. Crosby, 339 F.3d 1247, 1279-86 (11th Cir. 2003); Szabo v. Walls, 313 F.3d 392, 389-99 (7th Cir. 2002); State v. Towery, 64 P.3d 828 (Ariz. 2003); Head v. Hill, 587 S.E.2d 613, 618-18 (Ga. 2003); State v. Lotter, 664 N.W.2d 892, 903-09 (Neb. 2003); Colwell v. State, 59 P.3d 463, 469-73 (Nev. 2002); Ex Parte Briseno, 2004 Tex. Crim. App. LEXIS 199, *22-23 (Tex. Crim. App. Feb. 11, 2004); see also In Re Johnson, 334 F.3d 403 (5th Cir. 2003)(noting that issue was not properly before court but suggesting Ring not retroactive). Further, Ring arises from application of Apprendi, to Arizona's capital scheme. Every federal circuit court to address the issue has found that Apprendi is not retroactive. E.g., Sepulveda v. United States, 330 F.3d 55 (1st Cir. 2003); Coleman v. United States, 329 F.3d 77 (2d Cir. 2003); United States v. Swinton, 333 F.3d 481 (3rd Cir. 2003); United States v. Sanders, 247 F.3d 139, 146-51 (4th Cir. 2001)(finding that Apprendi's requirements of jury finding beyond a reasonable doubt of fact that increases statutory maximum for an offense "are not the types of watershed rules implicating fundamental fairness that require retroactive application."); United States v. Brown, 305 F.3d 304 (5th Cir. 2002); Goode v. United States, 305 F.3d 378 (6th Cir. 2002)("Apprendi does not create a new 'watershed rule.'"); Curtis v. United States, 294 F.3d 841 (7th Cir. 2002); United States v. Moss, 252 F.3d 993, 996-1001 (8th Cir. 2001)("Apprendi is not of watershed magnitude."); United States v. Sanchez-Cervantes, 282 F.3d 664 (9th Cir. 2002); United States v. Mora, 293 F.3d 1213 (10th Cir. 2002); McCoy v. United States, 266 F.3d 1245 (11th Cir. 2001). Thus, Ring does not apply to Van Poyck's claim. Certiorari should be denied.

Third, irrespective of the procedural bar and the fact that Ring would not be given retroactive application, Ring is

inapplicable in Florida. In Apprendi, this Court held that any fact, other than a prior conviction, that increased the statutory maximum sentence for a crime had to be presented to a jury and proven beyond a reasonable doubt. 530 U.S. at 940. In Ring, this Court held that Apprendi applied to Arizona's capital sentencing scheme based on the Arizona Supreme Court's holding that the statutory maximum for first degree murder in Arizona was life until an aggravator was proven. 536 U.S. at 603. In Harris v. United States, 536 U.S. 545 (2002), this Court made clear that its holding in Apprendi (and its progeny Ring) did not apply to all sentencing consideration. Instead, Apprendi (and its progeny Ring) only applied to those facts, other than a prior conviction, that increased the statutory maximum for a crime. Thus, to determine the applicability of Ring and Apprendi to any particular crime in any particular state, it is necessary to determine what the statutory maximum for that crime is in that state and whether that statutory maximum is increased by any fact finding.

Both before and after Ring, Florida Supreme Court has repeatedly held that a capital defendant is death eligible upon conviction for first degree murder, since the death penalty is the maximum sentence for first degree murder in Florida.[3] Mills v. Moore, 786 So. 2d 532, 536-538 (Fla.), cert. denied, 532 U.S. 1015 (2001); Mann v. Moore, 794 So. 2d 595, 599 (Fla. 2001), cert. denied, 536 U.S. 962 (2002); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003) ("Contrary to Porter's claims, we have repeatedly held that the maximum penalty under the statute is death"); Shere v. Moore, 830 So. 2d 56, 61 (Fla. 2002) ("This Court has defined a capital felony to be one where the maximum possible punishment is death"). Moreover the Florida Supreme Court has consistently rejected the position that a factor is an element of capital murder under Florida's statutory scheme. See Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will

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[3] Van Poyck claims that a majority of the Florida Supreme Court has sated that Ring applies to Florida's sentencing statute. Van Poyck is incorrect.

present at sentencing or a special verdict form indicating the aggravating factors found by the jury). Because Ring holds that any fact which increases the penalty beyond the statutory maximum must be found by the jury, and because death is the statutory maximum for first degree murder in Florida, Ring does not establish Sixth Amendment error under Florida's statutory scheme. Mills 786 So. 2d at 532; Mann, 794 So. 2d at 599; Porter, 840 So. 2d at 986; Shere, 830 So. 2d at 61. As such, nothing is increasing the statutory maximum in Florida. Thus, Ring does not apply to Florida.

In summary, review is not warranted. Van Poyck's Sixth Amendment challenge to his death sentence is procedurally barred; it is based on a case, i.e., Ring that is not subject to retroactive application; and Ring does not apply to Florida's sentencing scheme.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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